



**MENOMINEE INDIAN TRIBE OF WISCONSIN
CHAIRMAN'S OFFICE**

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August 21, 2017

Robert A. Kaplan
Acting Regional Administrator
U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Lt. Col. Dennis P. Sugrue
U.S. Army Corps of Engineers
Detroit District
477 Michigan Ave.
Detroit, MI 48226

**Re: Consultation Regarding Aquila Resources, Inc. Back Forty Mine Project
Permitting Pursuant to Section 404 of the Clean Water Act**

Dear Mr. Kaplan & Lt. Col. Sugrue:

The Menominee Indian Tribe of Wisconsin requests consultation with the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("USACE") in regard to 404 permitting related to the Back 40 mine project. The Back 40 mine project consists of an open pit (2,000 ft. wide, 2,500 ft. long and 750 ft. deep) gold-zinc sulfide mine located 150 feet from the banks of the Menominee River, near the creation site of the Menominee people. Construction and operation of the mine threatens to destroy significant historical and cultural resources of the Tribe, and presents significant harm to the Menominee River environment.

The United States of America owes a trust responsibility to the Menominee Indian Tribe of Wisconsin. The EPA and USACE as departments of the federal government are required to carry out that trust responsibility. Normally, EPA and USACE would carry out that responsibility as part of the federal permitting process pursuant to Section 404 of the Clean Water Act. As part of that permitting process, EPA and USACE would apply provisions of the National Historic Preservation Act and National Environmental Protection Act. Those provisions would allow for a full and fair investigation and review of the Menominee Indian Tribe's concerns regarding threats to its cultural properties and to the environment of the Menominee River. However, the mine site is located in Michigan and authority over certain 404 permitting has been delegated from the United States to the State of Michigan.

The State of Michigan has stated that it owes no trust duty to the Menominee Indian Tribe, and is not required to follow National Historic Preservation Act and National Environmental Protection Act standards protective of the Tribe's interests. As a result, the United States delegation of 404 permitting to Michigan acts as a diminishment of its trust responsibility to the Tribe.

The Tribe is conscious that the Clean Water Act prohibits the United States from delegating 404 permitting authority to the State of Michigan in regard to certain waters of the United States. As a result,

the accurate determination of the waters that have been delegated is crucial to the EPA and USACE fulfilling the United States' trust responsibility to Menominee.

We believe that the wetlands adjacent to the Menominee River on the Back 40 mine site constitute non-delegable waters, and therefore the USACE and not Michigan is the proper permitting authority. We base this on the following:

Background on Back 40 CWA 404 Permitting

Aquila Resources, Inc. ("Aquila") is proposing to develop the Back Forty Project on the banks of the Menominee River in Sections 1, 11, and 12 of township 35 North, Range 29 West; Sections 4-9 of Township 35 North, Range 28 West; and Section 32 of Township 36 North, Range 28, Lake Township, Menominee County Michigan. As part of the Back 40 project, Aquila intends to fill, dredge, and dewater certain wetlands. Pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) Aquila is required to obtain a permit ("404 permit") prior to such filling, dredging, or dewatering.

The Clean Water Act generally requires that the 404 permit be issued by the United States Army Corps of Engineers. However, the State of Michigan has assumed 404 permitting in regard to certain waters in Michigan pursuant to 33 U.S.C. § 1344(g)(1). Aquila, believing that the wetlands in question are subject to the State of Michigan's permitting authority, previously made application for such a permit from the Michigan Department of Environmental Quality ("MDEQ"). The EPA and USACE, acting under the same belief regarding Michigan's permitting authority, provided comments on the application to the MDEQ pursuant to the provisions of the Memorandum of Agreement between Michigan and the EPA regarding administration of Section 404 of the Clean Water Act ("MOA"). Aquila subsequently withdrew their request for a 404 permit from MDEQ; however they have re-filed with MDEQ in January of 2017. MDEQ found Aquila's second attempt at a 404 application to be administratively incomplete. In response Aquila has requested, and has been granted, multiple extensions of time to complete their application. The current extension request runs until August 30, 2017.

Authority to Delegate CWA 404 Permitting to State

The Clean Water Act limits the types of waters that the United States may delegate jurisdiction over for 404 permitting purposes. The Act allows for delegation of such permitting to States only in regard to:

"... navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto)." 33 U.S.C § 1344(g)(1).

The wetlands at issue in the Back 40 project are adjacent to the Menominee River. Therefore, if the Menominee River in the area of the wetlands at issue constitutes navigable waters that are currently used or susceptible to current use as a means to transport interstate commerce, then the

United States may not delegate the authority to issue a 404 permit regarding these wetlands to the State of Michigan.

Meaning of Interstate Commerce

The Menominee River adjacent to the wetlands at issue is an interstate body of water forming a boundary between the State of Michigan and the State of Wisconsin. In *Finneseth v. Carter* 712 F.2d 1041 (C.A.6 (Ky.), 1983), the Sixth Circuit Court of Appeals addressed the meaning of interstate commerce on a body of water lying in two different states. In *Finneseth*, the Court was asked to determine whether it had jurisdiction over a dispute resulting from a boat collision that occurred on Dale Hollow Lake which lies on the border of Kentucky and Tennessee. In order to determine whether there was federal jurisdiction over the dispute, the Court needed to find a number of things, including whether a wrongful injury occurred upon “navigable waters.” *Finneseth* at 1043. The Court found that Dale Hollow Lake would constitute navigable waters if:

“ . . . it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water.” *Finneseth* at 1044.

Although this definition of navigability was used to determine federal jurisdiction under admiralty law, it mirrors the non-delegability provision of 33 U.S.C. § 1344(g)(1). The Court found that Dale Hollow Lake was “used as an interstate highway for commerce” stating:

“In this case Dale Hollow Lake clearly meets the requirement that the lake be an *interstate* highway for commerce because it straddles Kentucky and Tennessee. Because the interstate nexus is satisfied in this manner, it is not probative that maritime traffic on the lake is prevented from traveling downstream by the lockless dam.” *Finneseth* at 1044.

The term “commerce” includes a wide variety of activities. The Ninth Circuit Court of Appeals determined that use of an Alaskan river for commercial recreational boating is sufficient evidence of the Water’s capacity to carry waterborne commerce. *Alaska v. Ahtna, Inc.*, 891 F.2d 1404, 1405 (9th Cir. 1989). Further, the non-delegability provision of 33 U.S.C. § 1344(g)(1) does not require that a body of water be actually used in interstate commerce, only that it be “susceptible” to such use. The Supreme Court of the United States has stated:

“Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.” *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940).

Menominee River Present Use and Susceptibility for Use to Transport Interstate Commerce

The Menominee River straddles Michigan and Wisconsin in the same way that Dale Hollow Lake straddles Kentucky and Tennessee. As found by the Sixth Circuit Court of Appeals in *Finneseth* this geographical location alone satisfies the requirement that any commerce present be interstate.

Based on minimal preliminary research it appears that the Menominee River is in fact presently used to transport interstate commerce in the following ways:

- Commercial guided fishing expeditions (<http://www.mikemladenik.com/services/>)
- Rafting (<http://www.wildmanranch.com/adventures-Menominee.php>)
- Resorts, restaurants, and recreational fishing all part of the multi-million dollar tourism industry in Michigan¹ and Wisconsin².

The best evidence that the Menominee River in the area of the adjacent wetlands at issue in the Aquila 404 permit is in fact presently used and is susceptible for use to transport interstate commerce comes from the USACE's own study of the issue. In December of 1979, the U.S.A.C.E. Detroit District commissioned a study of the navigable status of the Menominee River Basin of Michigan. That study found:

“The Menominee [River] is part of the border between Michigan and Wisconsin, and therefore, convenient for interstate transportation of goods between the two states. Ferrying of products, especially on the lakes formed as backwaters of the hydroelectric dams, would constitute interstate commerce.”³

That study concluded:

“The Corps maintains Section 10 jurisdiction on the Menominee River to mile 1.87 (km 3.01). Extension of this status is recommended to the source, mile 114.6 (km 184.3) at the confluence of the Brule and Michigamme Rivers. Recreational usage occurs throughout all reaches of the river, especially the backwaters of the hydroelectric dams located on the river.”⁴

A fresh review of the matter is likely to find that there is more interstate commerce on the Menominee River now than in 1979 at the time of the USACE study.

Existing USACE Determination Regarding the Menominee River

Despite the USACE Detroit District's own study in 1979 that recommended the entire Menominee River be deemed navigable, we understand that both the 1984 Memorandum of Agreement between the USACE and Michigan, and the most recent USACE Detroit District listing of Navigable Waters of the United States (“Section 10 Waters”) find that only the portion of the Menominee River up to but not including the U.S. Hwy 41 bridge constitutes navigable waters of the United States. The fact that USACE has listed the waters in question as delegated to

¹[http://www.michiganbusiness.org/cm/Files/Reports/MI%202016%20National%20Regional%20Ad%20Evaluation%20Image%20Study%20Final%20Report%20\(003\).pdf?rnd=1499446009520?rnd=1499446009520](http://www.michiganbusiness.org/cm/Files/Reports/MI%202016%20National%20Regional%20Ad%20Evaluation%20Image%20Study%20Final%20Report%20(003).pdf?rnd=1499446009520?rnd=1499446009520)

² <http://industry.travelwisconsin.com/uploads/medialibrary/e4/e4babea4-c3a0-4c8c-a9f8-5ce446c05b2c-poweroftourism-sheet.pdf>

³ See U.S. Army Corps of Engineers Detroit District, *Navigable Status of Menominee River Basin Michigan, Navigability Report: 64*, December 1979, p. 21. A copy of the report is attached to this Letter.

⁴ *Id.* at 28.

Michigan in a MOA is not dispositive of the issue. If the waters are non-delegable as a matter of law pursuant to 33 U.S.C. § 1344(g)(1), then any purported delegation of permitting authority over those waters is void and unenforceable.

Federal regulations state that precise definitions of “navigable waters of the United States” or “navigability” are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. (33 C.F.R. § 329.3). Further, USACE listings of Navigable Waters of the United States may be updated “as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.” (33 C.F.R. § 329.16).

The issue of defining what waters are assumable pursuant to Section 404(g)(1) has caused significant confusion since its inception. Many states and tribes have considered pursuing assumption, but determined not to proceed due to the uncertainty regarding what waters may be assumed.

The Assumable Waters Subcommittee was convened under the National Advisory Council for Environmental Policy and Technology (NACEPT) to consider the issue of which waters are legally assumable by a state or tribe under the Clean Water Act. The Assumable Waters Subcommittee presented their recommendations to the NACEPT members on May 10, 2017 and submitted it to Administrator Scott Pruitt on June 2, 2017.

The Subcommittee did not reach agreement on a single recommendation, and therefore a majority and a USACE alternative were put forth. Neither recommendation endorsed adoption of the Section 10 Waters list as determinative of whether a water is assumable. Both the majority and USACE recommend using the Section 10 Waters list as a starting point and modifying it as warranted. These recommendations by the Subcommittee and USACE are contrary to the 1984 Michigan approach which relies solely on the list of Section 10 Waters when determining assumability.

The issue of whether the MOA is dispositive was also touched on in *Huron Mountain Club v. United States Army Corps of Engineers, et al.*, No. 12-cv-197, 2012 U.S. Dist. LEXIS 102961, 2012 WL 3060146 (W.D. Mich. July 25, 2012). In that case Huron Mountain Club sought an injunction against Kennecott Eagle Minerals (“Kennecott”) construction of the Eagle Mine in the Upper Peninsula of Michigan based on a number of issues including that Kennecott had failed to obtain a § 404 permit from the USACE. In its brief in support of its injunction Huron Mountain Club did not address the issue of § 404 delegation to Michigan. Kennecott, in its brief in opposition, mentioned delegation in passing in a footnote. The federal defendants (USACE, EPA, DOI, etc.) in their brief argued that Michigan had assumed jurisdiction in this matter stating:

“In a separate agreement executed in 1984, the Corps and the State agreed that Michigan shall assume Section 404 regulatory jurisdiction over all waters in the State except those listed on the exhibit to the 1984 agreement. Id. ¶ 9, Appx. 2. The Salmon Trout River was not on the list and thus only the State of Michigan has Section 404 permitting authority over that water body. Id. ¶ 11.”

The federal defendants did not argue in their brief that the Salmon Trout River meets the definition for navigable waters where jurisdiction can be assumed by a state pursuant to 33 U.S.C. § 1344(g)(1). Instead they relied on the designation in the MOA with Michigan.

The District Court did not grant Huron Mountain Club's request for an injunction. In the portion of the Court's decision dealing with the issue of delegation of permitting authority to the State of Michigan, however, it rejected the notion that the agreement between Michigan and USACE was dispositive of the issue. Instead, it looked to whether the Plaintiff had provided adequate evidence as to the nature of the River stating:

"Section 404(g) of the Clean Water Act allows delegation only as to waters that are not "presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate . . . commerce." 33 U.S.C. § 1344(g). Even if Plaintiff could show that the Salmon Trout River can be used for interstate commerce above Sullivan Creek, Plaintiff has not presented any persuasive evidence that the waters of the Salmon Trout River in the vicinity of the Eagle Mine are presently used, or are susceptible to use, in their natural condition or by reasonable improvement as a means to transport interstate commerce."

Although Huron Mountain Club was ultimately unsuccessful in its claim that Michigan was unauthorized to assume § 404 permitting authority in regard to the Eagle Mine Project, the District Court focused on the characteristics of the water body in question to determine if the definition in § 404(g)(1) was met, and not merely on the listing in the USACE – Michigan MOA.

For all these reasons we believe that prior to moving forward with any 404 permit the EPA and USACE must make a specific formal determination regarding the jurisdictional status of the wetlands at issue in the Aquila permit. The only way to provide all sides of the project with clarity going forward is for the USACE to review all available information and conduct an Approved Jurisdictional Determination at the proposed location. Merely relying on the language of the existing MOA would constitute a failure to perform non-discretionary duties required by the Clean Water Act. It would also constitute a failure to meet the trust responsibilities of the United States to the Menominee Indian Tribe of Wisconsin. We are confident that a thorough review of the current status of interstate commerce on the Menominee River adjacent to the wetlands at issue, as well as a study of its susceptibility for future use in interstate commerce, will lead to the conclusion that the CWA does not allow for Michigan's assumption of jurisdiction pursuant to § 404(g)(1).

We would like to meet as soon as possible to consult with you on this issue. Please contact me at 715-799-5114 to schedule a time and place for this consultation.

Sincerely,



Gary Besaw
Chairman
Menominee Indian Tribe of Wisconsin